Goya Foods of Florida *and* UNITE! (Union of Needletrades, Industrial and Textile Employees, CLC).[1] Cases 12–CA–21168, 12–CA–21197, 12–CA–21787, and 12–CA–22225

August 23, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On April 24, 2003, Administrative Law Judge George Carson II issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed a brief in opposition to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as further discussed herein, and to adopt the recommended Order.

We affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally (a) assigned a new store account to a driver's delivery route in August or September 2000; (b) reassigned a store vacated by a departing employee to another sales employee in mid-October 2000; (c) changed the night shift starting time for warehouse employees on August 26, 2001; (d) assigned stores previously serviced by a unit driver to nonunit agency drivers from September through December 2001; (e) changed the delivery routes of drivers in April 2002; and (f), also in April 2002, eliminated drivers' ability to arrange both the order of daily deliveries and the order in which goods were to be loaded onto their delivery trucks.[3]

The Respondent's exceptions, inter alia, raise two common defenses to the findings of 8(a)(5) violations. First, the Respondent contends that it lawfully withdrew recognition from the Union as the collective-bargaining representative of a unit of sales employees and of a unit of drivers and warehouse employees in late 1999, prior to making any of the contested changes. The parties here litigated the legality of the Respondent's withdrawal of recognition in an earlier proceeding that was pending before the Board when the judge issued his decision in this case. Subsequently, the Board affirmed the findings of the judge in the prior case that the Respondent's withdrawal of recognition was unlawful, and it ordered the Respondent to recognize and bargain with the Union as the continuing bargaining representative of employees in the two bargaining units. *Goya Foods of Florida*, 347 NLRB 1118 (2006) (*Goya I*).[4] In light of *Goya I*, we reject the Respondent's contention that it had no general statutory obligation to bargain with the Union when it made the unilateral changes at issue here.

Second, the Respondent contends that it had no specific obligation to bargain with the Union prior to making route and store assignments to unit employees. It argues that all such assignments were consistent with a past practice of maintaining a dynamic status quo in which the stores assigned to sales employees and drivers fluctuated daily. The Board rejected the same argument in *Goya I*, finding that the Respondent failed to establish a past practice that would assertedly justify making the changes at issue without giving the Union prior notice and opportunity to bargain. The Board found that the Respondent relied on "an asserted historic right to act unilaterally, as distinct from an established past practice of doing so. . . . [T]hat right to exercise sole discretion changed once the Union became the certified representative." 347 NLRB 1118, 1120. Furthermore, contrary to the Respondent's claim, the credited testimony here shows that while sales employees and drivers would not necessarily service the same stores every day, or even every week, there was an established practice by which they would service the same routes within a specific geographic area for extended periods of time (years in some cases) and would regularly return to many of the same

[1] We have amended the caption to reflect the merger of the Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC (UNITE!) with the Hotel Employees and Restaurant Employees International Union, AFL–CIO, CLC (HERE), effective July 8, 2004, and the disaffiliation of UNITE HERE from the AFL–CIO effective September 14, 2005.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] For reasons stated in the judge's decision, we affirm his dismissal of allegations that the Respondent's assignment of overtime to warehouse employees since August 2000 violated Sec. 8(a)(5) and that the Respondent's President Unanue violated Sec. 8(a)(1) by threatening employee Miguel Then. Finally, we find it unnecessary to pass on whether the Respondent's April 2002 unilateral changes in violation of Sec. 8(a)(5) also violated Sec. 8(a)(3) because this additional finding would not materially affect the remedy. See, e.g., *United Rentals, Inc.*, 349 NLRB 853 at fn. 2 (2007).

[4] For reasons stated in the judge's decision, we affirm his ruling that the General Counsel did not abuse his prosecutorial discretion by engaging in impermissible relitigation or piecemeal litigation of various allegations in this proceeding. We also reject the Respondent's contention that the judge erred by issuing a decision in this case before the Board issued a decision in *Goya I*. The Respondent has failed to show that the judge's action was contrary to precedent, an abuse of discretion, or prejudicial to its other defenses.

stores within those routes. Consequently, we find no merit in the Respondent's defense that its store and route assignment changes were consistent with maintenance of an alleged dynamic status quo.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Goya Foods of Florida, Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Marcia Valenzuela, Esq., for the General Counsel.
James C. Crosland and *David C. Miller., Esqs.,* for the Respondent.
Mr. Rodolfo Chavez, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on February 24 and 25, 2003.[1] The complaint issued on September 27, 2002.[2] Pursuant to a private settlement, the Charging Party withdrew several allegations from the charge in Case 12–CA–22225 relating to the termination of alleged discriminatee Isain Navarro. I approved the partial withdrawal and dismissed the allegations of the complaint that were predicated upon the withdrawn aspects of that charge. The remaining paragraphs of complaint allege one violation of Section 8(a)(1) of the National Labor Relations Act, one violation of Section 8(a)(3) of the Act, and several unilateral changes in violation of Section 8(a)(5) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent did violate Section 8(a)(5) of the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Goya Foods of Florida, the Company, is a Delaware corporation engaged in the wholesale distribution of food products from its facility in Miami, Florida. The Company annually purchases and receives at its Miami, Florida, facility, goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC), the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Company distributes Hispanic food products from its warehouse located at 1900 NW 92nd Avenue in Miami. Employees performing this work include salesmen, merchandise employees, drivers, and warehousemen. On October 26, 1998, the Union was certified as the exclusive collective-bargaining representative of the driver and warehouse employees in the warehouse employees and drivers unit.[3] On December 4, 1998, the Union was certified as the exclusive collective-bargaining representative in the sales representatives and merchandising employees unit.[4] On December 7, 1999, the Company withdrew recognition from the Union with respect to the sales representatives and merchandising employees unit. On December 20, 1999, the Company withdrew recognition from the Union with respect to the Warehouse Employees and Drivers Unit.

The operations of the Company are overseen by President Robert Unanue who has held that position since August 1999. Unanue was the only witness to testify on behalf of the Company. There is no contention that the Company gave notice to the Union or afforded it an opportunity to bargain regarding any of the unilateral changes alleged in the complaint. The Company contends that it has no bargaining obligation, and its answer also denies many of the discrete acts that are alleged in the complaint and asserts that various changes to which it does admit were de minimus.

B. Procedural Matters

The Union filed unfair labor practice charges following the Company's withdrawals of recognition. These withdrawals, as well as other alleged unlawful actions, were found to have violated the Act by Administrative Law Judge Lawrence W. Cullen in *Goya Foods of Florida*, JD(ATL)–6–01 (February 22, 2001). Judge Cullen's decision is pending before the Board. All parties acknowledge that, if the Board should not adopt Judge Cullen's findings that recognition was unlawfully withdrawn so that no bargaining obligation exists, all of the 8(a)(5) allegations herein must be dismissed. The Respondent concedes that, if a bargaining obligation exists, any of the allegations herein that constitute substantial unilateral changes would violate the Act.

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[1] All dates are in 2002 unless otherwise indicated.

[2] The charge in Case 12–CA–21168 was filed on October 30, 2000; the charge in Case 12–CA–21197 was filed on November 16, 2000; the charge in Case 12–CA–21787 was filed on September 10, 2001 and was amended on November 27, 2001; and the charge in Case 12–CA–22225 was filed on April 26 and amended on June 20 and July 30.

[3] The Warehouse Employees and Drivers Unit is defined as follows:

> All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; excluding all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

[4] The Sales Representatives and Merchandising Employees Unit is defined as follows:

> All sales representatives and merchandise employees employed by the Employer at its facility located at 1900 NW 92nd Avenue, Miami, Florida 33172; excluding all office clericals, guards and supervisors as defined in the Act.

Following the issuance of Judge Cullen's decision on February 22, 2001, the Regional Director issued a complaint on September 25, 2001, in Cases 12–CA–21464 et al. alleging, inter alia, certain unilateral changes that had occurred subsequent to the Company's withdrawal of recognition from the Union. That case was heard by Administrative Law Judge Raymond P. Green in November 2001. The Respondent, in its brief, represents that Judge Green is holding his decision in abeyance pending the Board's action in the case heard by Judge Cullen, and it urges that I do likewise. The Respondent, both at the hearing and in its brief, argues that I should dismiss the allegations predicated upon the charges in Cases 12–CA–21168, 12–CA–21197, 12–CA–21787, all of which were filed prior to the hearing before Judge Green and that I also should dismiss the allegations relating to changed route assignments as charged in Case 12–CA–22225 insofar as the allegations constitute a continuing violation.[5] In that regard, at the hearing, I questioned whether, if found to have violated the Act, the Respondent would agree to "a full monetary remedy with regard to any commissions that were lost" based upon the route changes alleged in this proceeding and Counsel for the Respondent answered, "No."

The Respondent admits service of the charges in Cases 12–CA–21168, 12–CA–21197, and 12–CA–21787. No complaint had issued in any of those cases when the hearing was held before Judge Green. The Respondent did not move to leave open the record in that case pending action by the Region upon those charges or move that they be consolidated for hearing. See *Service Employees Local 87 (Cresleigh Management)*, 324 NLRB 774, 776 (1997). The General Counsel has "wide discretion in these matters, as befits a party exercising prosecutorial discretion." Ibid. I hereby reaffirm my denial of the Respondent's Motion to Dismiss. The allegations in this case are discrete and are not dependent upon any of the violations alleged in the case pending before Judge Green. If the Board rejects Judge Cullen's findings, there is no bargaining obligation and my findings will be a nullity. If there is a bargaining obligation, the Respondent, as in the case of a disputed certification, has acted at its peril in making unilateral changes. See *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). There is no reason for me to hold this decision in abeyance, and I shall not do so.

C. The 2000 and 2001 Unilateral Change Allegations

1. Distributed overtime

The complaint alleges that the Respondent, since August 2000, unilaterally "distributed overtime to warehouse employees." The General Counsel introduced documentary evidence establishing that various warehouse employees had worked overtime. There is no allegation or evidence of discriminatory distribution of overtime. Overtime is voluntary. Overtime has historically been offered to available employees. There is no evidence that the manner in which overtime is distributed changed or that any employee who sought overtime was denied overtime thereby affecting his earnings. I shall recommend that this allegation be dismissed.

[5] A motion in limine and the Motion to Dismiss, with attachment, are hereby received as R. Exhs. 4 and 5.

2. Assigned vacant stores to salesmen

Sales representatives in the Sales Representatives and Merchandising Employees Unit are paid on commission. The amount received depends upon the value of the products they sell to stores to which they are assigned. In mid-October 2000, a Sedano grocery store, referred to as Sedano 3, became available for assignment when the salesman who had previously serviced that store left the Company. The store was assigned to unit employee Hector Moro without notice to or bargaining with the Union.

There is no evidence of any written policy regarding the assignment of stores. President Unanue testified that the decisions regarding such assignments include consideration of the salesman's performance and record over a period of time and other criteria such as the proximity of the store to other stores served by the salesman in that area. Unanue stated that the assignment could also depend upon the ability of the salesman to perform merchandising, i.e., actually putting the product on the shelves, "which some salesmen may not be able to do, depending on age, physical disability, whatever."

The Respondent argues that it continued its past practice and that it is unreasonable to require it to bargain over every such assignment. That argument omits the crucial facts that such assignments were not made pursuant to any objective criteria but were discretionary and that these assignments have a direct impact upon the workload and earnings of employees.

In *Mackie Automotive Systems*, 336 NLRB 347, 350 (2001), the Board explained that continuation of past practices do not relieve employers of an obligation to bargain when employee wages are affected:

> It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees. *Porta-King Building Systems*, 310 NLRB 539, 543 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), enfd. 559 F.2d 187 (D.C. Cir. 1977).

The unilateral discretionary assignment of a vacant store with its commissions to a salesman constituted a change in working conditions and directly related to wages. By assigning the vacant store without notice to or bargaining with the Union, the Respondent violated Section 8(a)(5) of the Act.

3. Assigned new store to driver

Drivers are paid a base amount plus a commission of .75 percent of the value of the products they deliver. Around August or September, 2000, a large new store, Sedano 28, opened in Hialeah. The store was across from another store on employee Rudolfo Chavez' route and he asked supervisor Sergio Bazain to assign it to him. It was ultimately assigned to employee Isain Navarro who also had a route in the Hialeah area. As hereinafter discussed, prior to late April 2002, drivers served regular routes. The assignment of Sedano 28 to Navarro's route increased his commissions.

President Unanue testified that drivers were not assigned stores but did not deny that stores were assigned to routes. He gave no rationale regarding the manner in which stores were allocated to particular routes. Navarro, who was terminated in late April 2002, testified that the stores on his route that provided him the most commissions were "El Presidente, Wal-Mart, Sedano 28, Publix 586, National 2." [Emphasis added.]

The assignment of the new store, a store that produced high commissions, to Navarro's regular route effectively assigned the store to a driver as alleged in the complaint. The assignment constituted a change in working conditions and directly affected the driver's earnings. The Respondent's unilateral assignment violated Section 8(a)(5) of the Act.

4. Assigned work to nonbargaining unit employees

Employee Reinol Orta had a regular route in Little Havana for 4 years. In the latter part of 2001, in September and thereafter, Orta noticed occasions when he was not being assigned all of his regular stores. From conversations, including conversations with the drivers delivering to those stores and seeking directions, he learned that some stores on his route were, at various times, being served by drivers "from an office, an agency."

President Unanue acknowledged that the Respondent utilized drivers from an agency. He testified that "[w]e've always had a combination of agency and company drivers." He did not address the testimony of Orta that bargaining unit work that Orta would have performed had been diverted to agency drivers on various occasions.

The assignment of stores that Orta normally served to agency drivers deprived him of the commissions that he would have received had he delivered to those stores. The Respondent's unilateral assignment of those stores to nonunit drivers directly affected Orta's wages and violated Section 8(a)(5) of the Act.

5. Changed work hours of warehouse employees

The parties stipulated that the Company, on August 26, 2001, "changed the start times of the nighttime warehouse employees from 6 p.m. to 5:30 p.m." The Company argues that the foregoing change was "a routine adjustment without any impact upon any employee. President Unanue testified that "most of the employees would show up early" and that, since work was available, the Company changed the starting time. Notwithstanding the purported insubstantiality of the change, on August 27, 2001, when employee Eduardo Miyares was warned for missing work, he was also reminded that he had been late "on numerous occasions" and that "the starting time is 5:30 p.m. on the dot."

"It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment" without affording the employee collective-bargaining representative an opportunity to bargain, and "[i]t is immaterial that the Respondent's change may not have been unreasonable." *Flambeau Airmold Corp.*, 334 NLRB 165, 165–166 (2001). There is no evidence that the change in starting time was "routine," and the admonition to employee Miyares regarding being late contradicts the Respondent's argument that the change had no impact upon any employee. By unilaterally changing the starting time of night shift warehouse employees, the Respondent violated Section 8(a)(5) of the Act.

D. The 2002 Allegations

In late April, the Company began assigning drivers to routes other than the routes that they had regularly driven. Prior to late April, the drivers who delivered the Company's food products to various stores drove the same regular routes. Former employee Rodolfo Chavez, now an Organizer with the Union, testified that for the last 3 years of his employment he regularly delivered to stores in the area of Hialeah, Florida. He referred to that as his "route," noting that he would deliver to different stores on different days, that there were some stores to which he delivered each week and others to which he went only "every fifteen days or once a month, . . . [b]ut I was the only driver who d[id] those store[s]." Employee Isain Navarro also had a regular route in the Hialeah area, "[b]asically they were the same stores every week and the same route."

Although the Respondent's brief asserts that the drivers admitted delivering to distant locations, examination of the testimony confirms that the employees were serving regular routes. When first hired they were assigned distant locations but, as their seniority increased, their routes were, to quote driver Chavez, changed to "a better location, ... more commission, less [time]."

President Unanue explained that, in March 2001, the Company began using a computer software system, referred to as Roadnet, that sets up drivers' routes based upon "a myriad of variables" including such factors as when stores are open to take deliveries and when merchandising employees are available to place delivered merchandise into the store to which the driver has delivered the product. He explained that, prior to the implementation of the Roadnet system, the picking tickets would be generated by a computer, placed in order by a trip planner and thereafter a finished invoice would be produced. With the introduction of the Roadnet system, a trip is "organized before it's printed out."

Although testifying that "stores were not assigned" to drivers, President Unanue did not deny that stores were assigned to routes and that, prior to late April, drivers had regular routes.

It appears that the drivers began being assigned to routes other than their regular routes on April 22. The initial charge in Case 12–CA–22225 states the routes were changed on April 22 and that employee Isain Navarro's termination occurred "because of a dispute arising from the Employer's unilateral imposition of routes." The allegations relating to Navarro's termination were settled, but contemporaneous documents confirm the unilateral change. On April 24, Union Organizer William Gonzalez prepared a letter protesting the "illegal changes [with] respect [to] the routes of each driver." Although not sent until April 30, the date of April 24 and content of the letter confirm that the assignment of drivers to other than their regular routes had occurred by that date. Also on April 24, the Union distributed a handbill stating that Unanue had stated, "We distribute in all of Florida, the drivers do not have a fixed route and they have to go where we send them." The handbill thereafter refers to "illegal route changes."

The complaint alleges that the route changes violated both Section 8(a)(3) and Section 8(a)(5) of the Act, pleading that,

since April 25, 2002, the Respondent changed the route assignments of drivers including, but not limited to, drivers Eduardo Arguello, Reinol Orta, and Miguel Then because of their union activities. The General Counsel argues that the assignment of drivers to other than their regular routes resulted from the drivers' protected union activity in protesting "discriminatory conduct toward drivers in general and Navarro in particular." As already discussed, the assignment of drivers to routes other than their regular routes was the cause of the protest and the predicate for the Union's letter and handbill of April 24. Indeed, the Union alleged that Navarro's termination occurred "because of a dispute arising from the Employer's unilateral imposition of routes." The employees' protected activities protesting their unilateral assignment to other than their regular routes followed rather than preceded the unilateral change. There is no evidence that the assignment of drivers to other than their regular routes was motivated by the employees' union activities. I shall recommend that the 8(a)(3) allegation relating to this unilateral change be dismissed.

Following the termination of employee Navarro on April 26, employee Miguel Then and a group of employees sought to speak with President Unanue. Unanue refused to permit the group to enter through the security gate. Then spoke with him by telephone. He recalls that he informed Unanue that a group of workers wanted to talk to him "since he had told me that the door was always open" and that Unanue "told me that instead of being concerned about my job, I was pressuring and bribing the workers and that I was . . . responsible for what was going on and that I knew very well that as a group we did not exist there." Then responded that he [Unanue] couldn't say that because "he had lost all the cases he had in court." At that point, Then recalls that Unanue stated that he had "disrespected him" and hung up.

Unanue acknowledged that Then called, noting the he, Unanue, had always said that he was available, and stated that he wanted to speak with him regarding employee Navarro's discharge. Unanue recalls stating that he "wasn't going to discuss that with him or the group, I was not going to discuss it." Unanue testified that Then began raising his voice stating that "we had lost, that there's a Union and they had won some cases against us, and that we had lost." Unanue acknowledged that he then hung up.

The complaint alleges that the foregoing conversation "impliedly threatened employees with discharge due to their union support and activities." According to Then, who denied raising his voice, the conversation concluded with Unanue stated that "we," referring to the Union, "did not exist there," and that he told Unanue that "he had lost all the cases he had in court." Then's recollection of the conversation does not include protesting Navarro's termination but does include an admonition regarding Then being concerned about his job and pressuring and bribing workers. It seems far more likely that the predicate for the conclusion of the conversation regarding the status of the Union was Unanue's refusal to discuss Navarro's termination. Then's use of the word "we" referring to the Union and "he," treating Unanue as the embodiment of the Company, suggest that any reference by Unanue to "pressuring and bribing" was to the Union rather than Then. This conversation occurred some 10 months prior to the hearing. Then's use of the pronouns "we" and "he" without stating any antecedents in the conversation compel me to credit Unanue's denial that he made any threat to Then. I shall recommend that the allegation of an implied threat of discharge be dismissed.

Regarding the 8(a)(5) allegation relating to the route changes, notwithstanding the Company's institution of the Roadnet software, the record establishes that, if not all drivers, several drivers including Arguello, Orta, and Then had continued to serve their regular routes until late April when the Company began assigning them to other routes.

Prior to late April, employee Miguel Then had a regular route in the Hollywood/Dania area. In late April, Then began being sent to Key West, Port St. Lucie, Vero Beach, Naples, and Belle Glade. They "would take me out twice a week and then they will give me my fixed route" in the Hollywood/Dania area. Then noted that the trip to Key West was about 360 miles and took 3 and a 1/2 hours and that Naples was 2 hours away. He explained that the greater distances he had to drive had increased the hours that he had to work, from between 45 and 50 to over 50 hours a week. He also earned less because he was delivering less merchandise. Then confirmed that, prior to this, the other drivers also "always had specific routes."

Employee Reinol Orta had a regular route in Little Havana for 4 years. Beginning about the time that Navarro was terminated, the Company began to send him to Broward and West Palm Beach. Orta noted that he has difficulty with English, thus his work was complicated by the unfamiliar addresses to which he had to deliver. Because of this, he had to work more hours, and "I find myself more insecure in my job since I don't know the zones." Although Orta testified that the Company "change[s] me every day regularly to a different one [route], he acknowledged occasionally delivering his former regular route in Little Havana. In a pretrial affidavit dated July 7, Orta stated that, after being assigned other routes for a two week period, he was reassigned his regular route. He testified that although he had made that statement, he was assigned "from my zone" about once a week and that currently "it's daily that they change me from [my] zone." Orta testified that the change also affected him economically.

Employee Eduardo Arguello had, for over 5 years, had a regular route on U.S. Highway 1 from 104th Street to Homestead, Florida, with one Wal-Mart in Florida City. At the time that Navarro was fired, Arguello began being sent on other routes including Hialeah, Naples, Port St. Lucie, Key West, Fort Lauderdale and West Palm Beach. He explained that going to these locations made his job more difficult. Arguello explained, "I'm going into an area that I don't know. . . . I ask them to give me a map. They do, but it still takes a while to locate the stores, you know, in a town that you're not familiar with, compared to the route that I did. I knew where everything was. I had no problem getting there." Whereas previously he would complete his route at 2 or 2:30 p.m., when serving an unfamiliar route he does not complete his work until 4 or 4:30 p.m. Arguello acknowledged that he occasionally is assigned his former regular route.

Drivers are informed by telephone each evening by a trip planner of the route they are assigned the following day. Prior

to late April, these calls would simply confirm the stores on the driver's regular route that were scheduled for delivery the following day and give the driver the opportunity to state the order in which he intended to deliver the stores so that the last stop would be the first placed into the truck and the first stop would be at the back. Employee Miguel Then testified that, when the trip planner called, he would "tell them which ones I would do first so that they could set up the truck in the order in which I was going to deliver them." This ceased in late April at the time that drivers began being assigned other than their regular routes. Even when assigned their regular routes, the Company ceased taking the driver's request for the order in which his stops were to be loaded. Employee Reinol Orta testified that, "practically immediately" after Navarro was terminated, a trip planner he identified as "Chris," "communicated that I couldn't accommodate my route" by placing the stops in order. Eduardo Arguello was also informed by "Christian" that he was "supposed to do the order of stores the way they gave them to us."

Then explained the impact of this change, noting that recently his first stop was a Publix grocery store that is located at 41st Street and 97th Avenue. Because he was no longer permitted to set up the order in which merchandise was loaded, he ended up with a final stop at a Publix store located at 107th Avenue and 58th Street. If he had been permitted to set the order in which his truck was loaded he would have placed that second Publix store as his second stop since it was only 5 minutes from the first stop. Because he was not permitted to do so, he had to return later in the day. Because it was later in the day, "it took me about an hour to get there because of the traffic. If they had done it in the morning, I would have been done in five minutes. And that's the way that I've been affected."

President Unanue testified that at no time did any driver have "final authority" to dictate the order in which his truck was loaded and gave one example of an occasion when a driver's request had not been followed. Notwithstanding the absence of "final authority," Unanue did not deny that, prior to late April, the drivers, in their informal conversations with the trip planners, would state the order in which they wanted their trucks loaded and that the suggestion would, except in unusual circumstances, be followed.

The Company introduced several documents reflecting that, prior to April 2002, different drivers had delivered to the same store. Former employee Chavez explained that, on occasion, he would be unable to serve all of the stores on his route and that the overflow would be assigned to another driver. He also noted that there were occasions when a driver could not complete his route because of the amount of merchandise and that either that driver or another driver who volunteered would be assigned a "second trip." Regardless of the circumstances, the evidence of deliveries by different drivers to the same store does not contradict the credible testimony of the drivers who testified before me that, prior to late April 2002, they were assigned regular routes and were not regularly taken off of those routes to serve distant locations such as Key West and Naples.

The Company also introduced documents reflecting the commissions earned by drivers in addition to their base pay, comparing their commissions in the year 2000 with the year 2002 and showing that in virtually every case their earnings had increased. The issue, as the testimony of the drivers established, is not only a change in earnings but also a change in working conditions. All confirmed that being assigned to unfamiliar routes increased their working time. Drivers are not compensated for overtime. Furthermore, the relevant inquiry regarding earnings is not that they earned the same or somewhat more but what they would have earned if they had continued to serve their regular routes.

After a respondent incurs a bargaining obligation, it is not privileged to unilaterally change employees' job assignments insofar as such a change affects an employee's working conditions. *Lawson Printers*, 271 NLRB 1279, 1285 (1984).

The Respondent's assignment of drivers, including but not limited to Eduardo Arguello, Reinol Orta, and Miguel Then, to routes other than their regular routes and its failure to permit them to suggest the order in which they wished their trucks to be loaded changed the working conditions of these employees. The foregoing changes in the working conditions of employees occurred without notice to or bargaining with the Union. By unilaterally altering the working conditions of its employees, the Respondent violated Section 8(a)(5) of the Act.

CONCLUSION OF LAW

By making the unilateral changes in the terms and conditions of employment of its employees as set forth in this decision without giving notice to, and bargaining with, the Union, Respondent violated Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having unilaterally assigned bargaining unit work performed by employee Reinol Orta to nonunit agency employees from September through December 2001, it must make him whole for any earnings he lost as a result of those assignments.[6]

The Respondent must rescind the change in the starting time for night shift warehouse employees.

The Respondent having unilaterally changed the job assignments of drivers, including Eduardo Arguello, Reinol Orta, and Miguel Then, by assigning them to routes other than their regular routes, it must make them and any other drivers similarly affected whole for any earnings they lost as a result of this unilateral change, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

[6] The vice in the Respondent's assignments of Sedano 3 to salesman Moro and of Sedano 28 to driver Navarro is its unilateral action. Although Chavez requested Sedano 28, the record does not establish who should have received either assignment, neither of which is alleged to have been discriminatory. In these circumstances, there is no basis for a make whole remedy.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

ORDER

The Respondent, Goya Foods of Florida, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC) as the exclusive collective-bargaining representative of its drivers and warehouse employees in the Warehouse Employees and Drivers Unit and its sales representatives and merchandising employees in the Sales Representatives and Merchandising Employees Unit by unilaterally assigning sales representatives to vacant stores and drivers to new stores, by assigning nonunit personnel to perform bargaining unit work previously performed by unit drivers, by changing the reporting time of night shift warehouse employees, by assigning drivers to other than their regular routes, and by ceasing to permit drivers to suggest the order in which merchandise is to be loaded into their trucks.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unilateral changes it has made in the terms and conditions of employment of unit employees by assigning bargain unit work to nonunit drivers, changing the starting time of work for night shift warehouse employees, assigning drivers to other than their regular routes, and ceasing to permit drivers to suggest the order in which merchandise is to be loaded into their trucks.

(b) Notify and give the Union an opportunity to bargain before making any change in the terms and conditions of employment of unit employees.

(c) Make whole Reinol Orta for any loss of earnings he suffered as a result of the assignment of bargaining unit work to agency drivers in the manner set forth in the remedy section of the decision.

(d) Make whole Eduardo Arguello, Reinol Orta, and Miguel Then and any other drivers affected by their assignment to routes other than their regular routes in the manner as set forth in the remedy section of the decision.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Miami, Florida, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 24, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with UNITE! (Union of Needletrades, Industrial and Textile Employees, AFL–CIO, CLC) as your exclusive collective-bargaining representative in the warehouse employees and drivers unit and sales representatives and merchandising Employees unit by unilaterally assigning sales representatives to vacant stores and drivers to new stores, by assigning nonunit personnel to perform bargaining unit work previously performed by unit drivers, by changing the reporting time of night-shift warehouse employees, by assigning drivers to other than their regular routes, and by ceasing to permit drivers to suggest the order in which merchandise is to be loaded into their trucks.

WE WILL NOT in any like or related manner interfere with, restrain, and coerce you in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL notify and give the Union an opportunity to bargain

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

before making any change to your terms and conditions of employment.

WE WILL rescind the change we made in the starting time of night-shift warehouse employees, cease assigning drivers to other than their regular routes, and cease refusing to permit drivers to suggest the order in which merchandise is to be loaded into their trucks.

WE WILL make whole Reinol Orta for any loss of earnings he suffered as a result of the assignment of his bargaining unit work to agency drivers, with interest.

WE WILL make whole Eduardo Arguello, Reinol Orta, and Miguel Then and any other drivers affected by their assignment to routes other than their regular routes, with interest.

GOYA FOODS OF FLORIDA